

## II. SETTLEMENT AUTHORITY

### A. The Attorney General, Deputy Attorney General, and Associate Attorney General

The Attorney General has broad and plenary settlement authority as to any matter referred to the Department of Justice, whether for prosecution or defense. Section 5 of Executive Order 6166, June 10, 1933; 2/ 38 Op. Att'y Gen. 98 (1934). 3/

The Attorney General's settlement authority is redelegated on terms set forth in the Code of Federal Regulations. Pursuant to 28 C.F.R. § 0.161, the Deputy Attorney General is authorized to exercise the settlement authority of the Attorney General as to all claims on behalf of, and all claims against, the United States. By order dated October 19, 1992, the Attorney General has directed that the Associate Attorney General, with respect to matters in the Tax Division, should exercise the authority and perform the functions of the Deputy Attorney General under 28 C.F.R. § 0.161. Accordingly, all settlements which do not fall within the authority delegated to the Assistant Attorney General of the Tax Division are referred to the Associate Attorney General.

### B. The Assistant Attorney General

The Attorney General has delegated the following settlement authority to the Assistant Attorney General (28 C.F.R. §§ 0.160, 0.162, 0.164):

(1) To accept offers in compromise of claims on behalf of the United States in all civil cases in which the difference between the gross amount of the original claim and the proposed settlement does not exceed \$2,000,000 or 15% of the original claim, whichever is greater.

(2) To concede civil claims asserted by the United States where the gross amount of the original claim does not exceed \$2,000,000.

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2/ Executive Order No. 6166 is reprinted following 5 U.S.C.A. § 901.

3/ The October 2, 1934, Opinion of the Attorney General is set out in the Appendix as Exhibit A.

(3) To accept offers in compromise of, or concede, claims against the United States where the principal amount of the Government's concession does not exceed \$2,000,000, except that there is no monetary limitation on the Assistant Attorney General's authority in any case where the Joint Committee on Taxation has indicated it has no adverse criticism to the settlement or concession.

(4) To accept offers to compromise all nonmonetary cases.

(5) To reject offers in compromise in all cases.

The Assistant Attorney General has redelegated settlement authority in Tax Division Directive No. 105.

#### C. Joint Committee on Taxation

Pursuant to § 6405 of the Internal Revenue Code, refunds or credits in excess of \$1,000,000 with respect to specified taxes must be reported by the Secretary of the Treasury to the Joint Committee on Taxation. Since the 1930s there has been agreement among the Department of Justice, the Department of the Treasury and the Joint Committee on Taxation that refunds or credits in Justice Department cases, in excess of the amount specified in § 6405, will be reported to the Joint Committee.

The refunds or credits which must be reported to the Joint Committee are those relating to --

income, war profits, excess profits, estate, or gift tax, or any tax imposed with respect to public charities, private foundations, operators' trust funds, pension plans, or real estate investment trusts under chapter 41, 42, 43, or 44 \* \* \*.

Refunds or credits of other excise taxes, employment taxes, and liabilities imposed under § 6672 need not be submitted to the Joint Committee.

Refunds or credits allowed pursuant to § 6411 (tentative allowances) are not referred by the Internal Revenue Service to the Joint Committee at the time of allowance. However, in any such case, to the extent that such an allowance (reduced by deficiencies subsequently determined) exceeds \$1,000,000, the refund or credit must be submitted to the Joint Committee. This situation arises, for example, in bankruptcy cases.

For further discussion of settlements requiring reference to the Joint Committee, see Chapter J, infra, re conditions and limitations on redelegations of authority, and Chapter K, infra, concerning determination of the jurisdictional amount.

Although § 6405 provides only that no refund or credit shall be made until after the expiration of 30 days from the date a report is submitted to the Joint Committee, the Department will not authorize an overpayment until the Joint Committee has advised whether it has any adverse criticism to the settlement.

All settlements requiring reference to the Joint Committee on Taxation must be approved by the Assistant Attorney General.

#### D. Trial Section

The Assistant Attorney General has redelegated authority to the Chiefs of the Civil Trial Sections and the Court of Federal Claims Section, who are authorized, provided that such action is not opposed by the Internal Revenue Service, to:

(1) Accept offers in compromise in all civil cases, other than (i) cases involving liability under § 6672 of the Internal Revenue Code and (ii) cases in which judgments in favor of the United States have been entered, in which the amount of the Government's concession, exclusive of statutory interest, does not exceed \$300,000,

(2) Approve concessions in all civil cases, other than cases involving liability under § 6672 of the Internal Revenue Code, not exceeding \$200,000, exclusive of statutory interest,

(3) In civil cases involving liability under § 6672 of the Internal Revenue Code, (i) accept offers in compromise in which the amount of the Government's concession, exclusive of statutory interest, does not exceed \$500,000 and (ii) approve concessions not exceeding \$350,000, exclusive of statutory interest,

(4) Accept offers in compromise of judgments in favor of the United States in all civil cases in which the amount of the Government's concession, exclusive of statutory interest, does not exceed \$500,000,

(5) Accept offers in compromise in injunction or declaratory judgment suits against the United States in which the principal amount of the related liability, if any, does not exceed \$300,000,

(6) Accept offers in compromise in all other nonmonetary cases, and

(7) Reject offers in compromise of all civil cases, regardless of amount.

The Chiefs of the Civil Trial Sections and the Court of Federal Claims Section are authorized on a case-by-case basis to redelegate in writing to their respective Assistant Section Chiefs or Reviewers the authority delegated to them to reject offers, to accept offers in compromise in which the amount of the Government's concession, exclusive of statutory interest, does not exceed \$100,000, and to approve concessions not exceeding \$100,000, exclusive of statutory interest, provided that such redelegation is not made to the attorney of record in the case. The redelegations pursuant to this section shall be by memorandum signed by the Section Chief, which shall be placed in the Department of Justice file for the applicable case. A sample form of such a memorandum is set out in the Appendix as Exhibit B.

#### E. Appellate Section

The Chief of the Appellate Section is authorized, provided that such action is not opposed by the Internal Revenue Service, or by the chief of the section in which the case originated, to:

(1) Accept offers in compromise with reference to litigating hazards of the issues on appeal in all civil cases in which the amount of the Government's concession, exclusive of statutory interest, does not exceed \$300,000,

(2) Accept offers in compromise in declaratory judgment suits against the United States in which the principal amount of the related liability, if any, does not exceed \$300,000,

(3) Accept offers in compromise in all other nonmonetary cases which do not involve issues concerning collectibility, and

(4) Reject offers in compromise in all cases, regardless of amount.

#### F. Solicitor General

In any Supreme Court case, the final action on an offer in compromise must have the approval of the Solicitor General. In any case in which the Solicitor General has authorized an appeal

to any other court, a compromise offer, or any other action which would terminate the appeal, may be accepted or acted upon only upon advice from the Solicitor General that the principles of law involved do not require appellate review in that case.  
28 C.F.R. § 0.163.

#### G. Office of Review

The Chief of the Office of Review is authorized, provided that such action is not opposed by the Internal Revenue Service, or the chief of the section to which the case is assigned, to:

(1) Accept offers in compromise of claims against the United States in all civil cases in which the amount of the Government's concession, exclusive of statutory interest, does not exceed \$1,500,000 (\$1,000,000, if reference to the Joint Committee on Taxation is required),

(2) Accept offers in compromise of claims on behalf of the United States in all civil cases in which the difference between the gross amount of the original claim and the proposed settlement does not exceed \$1,500,000 or 15% of the original claim, whichever is greater,

(3) Approve concessions in all civil cases not exceeding \$1,000,000, exclusive of statutory interest,

(4) Accept offers in compromise in all nonmonetary cases, and

(5) Reject offers in compromise or disapprove proposed concessions, regardless of amount.

#### H. Deputy Assistant Attorneys General

The Deputy Assistant Attorneys General are authorized, provided that such action is not opposed by the Internal Revenue Service, to:

(1) Accept offers in compromise of claims against the United States in all civil cases in which the amount of the Government's concession, exclusive of statutory interest, does not exceed \$2,000,000 (\$1,000,000, if reference to the Joint Committee on Taxation is required),

(2) Accept offers in compromise of claims on behalf of the United States in all civil cases in which the difference between the gross amount of the original claim and the

proposed settlement does not exceed \$2,000,000 or 15% of the original claim, whichever is greater,

(3) Approve concessions in all civil cases not exceeding \$1,500,000, exclusive of statutory interest (\$1,000,000, if reference to the Joint Committee on Taxation is required),

(4) Accept offers in compromise in all nonmonetary cases, and

(5) Reject offers in compromise or disapprove proposed concessions, regardless of amount.

#### I. United States Attorneys

With respect to judgments which have been formally referred to the United States Attorney for collection, and provided that such action has the concurrence in writing of the Internal Revenue Service, United States Attorneys are authorized to:

(1) Reject offers in compromise of judgments in favor of the United States, regardless of amount,

(2) Accept offers in compromise of judgments in favor of the United States where the amount of the judgment does not exceed \$300,000,

(3) Terminate collection activity by that office as to judgments in favor of the United States which do not exceed \$300,000 if the United States Attorney concludes that the judgment is uncollectible.

Additionally, United States Attorneys are authorized to release the right of redemption of the United States in respect of tax liens, arising under 28 U.S.C. § 2410(c) or under state law, when the United States has been joined as a party to a suit, provided that:

(1) This authorization relates only to real property on which is located only one single-family residence, and to all other real property having a fair market value not exceeding \$200,000, except that the limitation as to value or use shall not apply in those cases in which the release is requested by any federal agency.

(2) The consideration paid for the release must be equal to the value of the right of redemption, or

\$50, whichever is greater, except that no consideration shall be required for releases issued to any federal agency.

(3) The United States Attorney has obtained appraisals by two disinterested and well-qualified persons, except that in those cases in which the applicant is a federal agency, the appraisal of that agency may be substituted for the two appraisals generally required.

J. Conditions and limitations on settlement authority

The settlement authority is subject to these conditions and limitations.

First, when, for any reason, the compromise or concession of a particular claim, as a practical matter, will control or adversely influence the disposition of other claims totaling more than the respective amounts designated, the case shall be forwarded for review at the appropriate level for the cumulative amount of the affected claims.

Second, when, because of the importance of a question of law or policy presented, the position taken by the Internal Revenue Service or by the United States Attorney involved, or any other considerations, the person otherwise authorized to take final action is of the opinion that the proposed disposition should be reviewed at a higher level, the case shall be forwarded for such review.

Third, if the Tax Division has previously submitted a case to the Joint Committee on Taxation leaving one or more issues unresolved, any subsequent compromise or concession in that case must be submitted to the Joint Committee, whether or not the subsequent overpayment exceeds the amount specified in § 6405 of the Internal Revenue Code.

K. Determination of settlement jurisdiction amounts

Except for the conditions and limitations on settlement authority just discussed, that authority is entirely dependent on the amount that the Government concedes, whether by compromise or concession. For purposes of determining settlement authority, whether or not the settlement has been achieved as the result of alternative dispute resolution is irrelevant.

Clearly, concession of any part of principal (generally tax and/or penalties) of a claim on behalf of or against the Government is taken into account in determining jurisdictional limits. The only exception to this rule is when the settlement relates only to a specific fund, for example, in an interpleader, and the total amount of the fund is less than the Government's claim.

For purposes of determining who has the authority to act on an offer or proposed concession, unpaid interest on a Government claim, whether or not assessed, is not taken into account.

Generally, in a refund context, interest paid by a taxpayer which will constitute an overpayment under the settlement or concession is taken into account, but statutory interest to be paid on the amount of the overpayment is not taken into account. On the other hand, where a settlement or concession of a claim against the Government relates solely to statutory interest, the amount of statutory interest foregone by the United States is the jurisdictional amount which determines who has authority to act on the claim.

Penalties, whether on a Government claim (whether accrued or assessed) or on a claim against the Government, are always taken into account in determining the jurisdictional amount.

Penalty and interest paid can add up to a very substantial portion of a claim, so that one must really look at the figures when deciding where settlement authority lies. By way of illustration, assume a settlement offer in a valuation case which calls for a refund of tax (\$55,000), plus appropriate interest which has been paid (\$57,000), plus concession in toto of the \$ 6659 penalty (\$98,000), plus interest paid with respect thereto (\$101,000), plus statutory interest. The total refund proposed is thus \$311,000, requiring reference to the Office of Review.

Where both refunds and counterclaims (or deficiencies) are involved, add together the amount of the concession as to both claims by and against the Government in order to determine the jurisdictional amount. For example, assume a \$500,000 refund claim which is being settled by a refund of \$50,000 and concession of a \$300,000 counterclaim. The amount of the Government concession is \$350,000.

L. Classification of cases as "Standard" or "Settlement Option" ("SOP")

At the commencement of litigation, cases are classified by the Internal Revenue Service as either "standard" or "settlement



option" ("SOP"). "Settlement option" cases generally involve factual issues or nonrecurring legal issues.

The classification as "standard" or "SOP" appears either in the defense letter (in defensive litigation) or in the letter from the Internal Revenue Service authorizing institution of the suit. If the letter from District Counsel in general litigation cases involving less than \$200,000 fails to classify the case, the Tax Division may assume that the case is classified SOP. <sup>4</sup>/ After development of a case, the Trial Attorney may find that the case does not warrant "standard" classification; in that event the Trial Attorney may want to ask the Service whether it would reclassify the case as "SOP".

It is unnecessary to obtain the recommendation of the Service in "settlement option" cases which are compromised. This is so, even though the case requires reference to the Joint Committee on Taxation. However, in cases where full concession of an issue or a case is proposed, the recommendation of the Service must be obtained (except in cases involving liability under § 6672 of the Code).

M. Internal Revenue Service authority to settle bankruptcy cases -- the exception to the general rule

1. The general rule

Pursuant to Section 5 of Executive Order 6166, June 10, 1933, and § 7122 of the Internal Revenue Code, the Department of Justice has exclusive settlement authority as to defense of any tax claim against the Government and prosecution of any tax claim on behalf of the Government. The tax liability for each year or other period constitutes a separate cause of action. Commissioner v. Sunnen, 333 U.S. 591 (1948). Accordingly, the Internal Revenue Service no longer has jurisdiction with respect to a tax liability which is the subject of litigation in a court other than the Tax Court (except to the extent set forth with respect to bankruptcy cases, below).

After a judgment is obtained on a Government claim, e.g., a counterclaim in a refund suit, or a suit to reduce an assessment to judgment, the Department retains all settlement authority. The assistance and efforts of the Internal Revenue Service are,

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<sup>4</sup>/ "General litigation" refers broadly to all matters handled in the Civil Trial Sections other than refund suits, suits for the allowance of additional interest, and declaratory judgment actions authorized by Title 26.

of course, essential in obtaining information re collection potential and collection itself. Nonetheless, without the knowledge and consent of the Trial Attorney the Internal Revenue Service should not, for example, send notices of intent to levy and/or enter into negotiations to settle a judgment until formal reference of the matter back to the Internal Revenue Service for collection. Even after such formal reference a compromise of the judgment must be referred to the Tax Division for approval.

2. Internal Revenue Service authority  
to settle bankruptcy cases

In bankruptcy cases, the Internal Revenue Service has jurisdiction to settle, compromise or reduce the proof of claim under certain limited circumstances. 5 Administration, CCH Internal Revenue Manual, Ex. 8(15)00-1 at 26,260.

(a) Before or after objection to a proof  
of claim has been filed

Reductions of proofs of claim based on criteria ordinarily used by revenue agents or revenue officers in resolving cases (for example, a concession where there is no doubt that the tax is not due, or one based on acceptance of substantiation) may be agreed to by the Internal Revenue Service whether or not an objection has been filed. After an objection has been filed, however, the Internal Revenue Service may enter into negotiations with respect to a settlement based on criteria ordinarily used by revenue agents or revenue officers in resolving cases only if the debtor or trustee agrees to an extension so that the matter will, in any event, not be brought on for hearing earlier than 30 days after termination of negotiations.

(b) Before an objection to a proof  
of claim has been filed

The Internal Revenue Service has exclusive jurisdiction to settle or concede a claim based on litigating hazards after the petition in bankruptcy is filed as long as no objection has been filed and the Service obtains a closing agreement with respect to settlement which binds both the debtor and the trustee. (In a no-asset case, the agreement of the trustee is not necessary.)

(c) After an objection to a proof  
of claim has been filed

The Internal Revenue Service may not enter into compromises or concessions based in any part upon litigating hazards, or

considerations such as choosing the proper litigating vehicle,  
after an objection to a proof of claim is filed.